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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

HANDLE WITH CARE BEHAVIOR MANAGEMENT SYSTEM, INC.,

Petitioner,

- against -

NEW YORK STATE DIVISION FOR YOUTH, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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On the Petition

May 12, 2009

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QUESTION PRESENTED

Does a complaint state a Rule of Reason violation of Section One of the Sherman Act by alleging specific actual anti-competitive effects, irrespective of the relevant market definition?

PARTIES TO THE PROCEEDING

Bruce CHAPMAN and Handle With Care Behavior Management System, Inc., Petitioners,

v.

NEW YORK STATE DIVISION FOR YOUTH, New York State Office of Children & Family Service, New York State Department of Social Services, John Johnson, Commissioner of New York State Office of Children and Family Services, and former Commissioner of the New York State Division for Youth, in his official and individual capacity, Margaret Davis, former Director of Training for the New York State Division for Youth, and former Director of Training for New York State Office of Children and Family Services, in her official and individual capacity, Patsy Murray, former Associate Training Technician for the New York State Division for Youth, and current position as Trainer for New York State Office of Children and Family Services, in her official and individual capacity, Cornell University, Jeffrey Lehman, President of Cornell University, in his official and individual capacity, Doctor Hunter Rawlings, III, former President of Cornell University, in his official and individual capacity, New York State College of Human Ecology, Family Life Development Center, Residential Child Care Project, Therapeutic Crisis Intervention, Martha Holden, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in her official and individual capacity, Michael Nunno, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in his official and individual capacity,

Hillside Children's Center, Dennis Richardson, President and CEO of Hillside Children's Center, in his official and individual capacity, Douglas Bidleman, Employee of Hillside Children's Center and Therapeutic Crisis Intervention Trainer, in his official and individual capacity, Respondents.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Handle With Care Behavior Management System, Inc. is wholly owned by Bruce Chapman, its President and sole shareholder. It does not have a parent corporation and no publicly traded company owns 10% or more of Petitioner's stock.

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The judgment and opinion of the United States Court of Appeals for the Second Circuit, was issued on October 14, 2008. An order denying a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, was issued on February 11, 2009

JURISDICTION

Subject matter jurisdiction of the United States District Court for the Northern District of New York was conferred pursuant to 15 U.S.C.A. §§ 15 and 26, 28 U.S.C.A §§ 1331, 1337, 1343 and 1367.

Appellate jurisdiction was conferred on the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. §§ 158 and 1291.

Pursuant to 28 U.S.C. §2101 and Rule 13 of this Court, this petition for a Writ of Certiorari was filed within ninety (90) days after entry of the order denying discretionary review. The statutory provision believed to confer jurisdiction on this Court to review this Writ of Certiorari is 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C.A. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C.A. § 15

§ 15. Suits by persons injured

(a) Amount of recovery: prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under

this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

* * * *

(c) Definitions

For purposes of this section--

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28 . . ..

15 U.S.C.A. § 26

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

STATEMENT OF THE CASE

The Allegations in the Complaint: The Autonomy of the Private Foster Agencies and OCFS's Regulatory Oversight

Petitioner Handle With Care Behavior Management System, Inc. ("HWC") is a provider of training in physical restraint and behavior management to public and private agencies in New York State and elsewhere. HWC alleged collective conduct by Respondents Cornell University ("Cornell"), The New York State College of Human Ecology ("CHE"), and a state agency now known as the New York State Office of Children and Family Services ("OCFS").

Respondents' collective conduct, persisting over twelve years, consisted of an agreement under which OCFS refused regulatory approval of the restraint policies of each of the approximately160 privately-owned and autonomous foster care agencies (termed "Private Foster Agencies," or "PFAs," herein)[1]

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[1] This number is from 31 New York State Register 18 (May 6, 2009) at 4 (available at http://nysl.nysed.gov/Archimages/107315.PDF). PFAs are the principal institutions in New York State that take in foster children. The Complaint used various terms to describe the PFAs, such as "child care providers" (¶ 23) and "private child care providers" (¶ 31). They are statutorily defined as "voluntary authorized agencies." N.Y. Soc. Serv. Law §§ 371(10)(a) and (c); 18 N.Y.C.R.R. § 441.2(b). Unless otherwise indicated, paragraphs citations herein are to the Complaint, and "A" citations are to pages in the Joint Appendix in the

throughout New York State -- unless each PFA contracted with Cornell to use Cornell's "Therapeutic Crisis Intervention" ("TCI") program to provide restraint training to PFA staff (¶¶ 35, 87, 90; A-48, A-95 - A-102, A-124 - A-136).[2] CHE works with Cornell in marketing the TCI program and in providing the training (¶¶ 91-92).

Statutes and regulations governing PFAs afford such agencies substantial autonomy. N.Y. Soc. Serv. Law ("NY-SSL") § 460-a; 18 NYCRR §§ 441.3, 482.3.[3] The PFA's board of directors manages the affairs of such agency, 18 N.Y.C.R.R. § 441.3(a)(1)) and the chief executive officer ("CEO") is responsible to the board. 18 N.Y.C.R.R. § 441.3(a)(4)(i). The boards of the PFAs are charged with "assur[ing] the proper care of children for whom such agency is responsible." 18 N.Y.C.R.R. § 441.3(a)(4)(iii). The responsibilities of the CEO of a PFA -- that is, not OCFS -- include the duty to "direct, evaluate and coordinate all aspects of an agency's program," including "staff development *and training*."

Second Circuit. (Citations to the Appendix hereto are denominated with "a" following the page number.)

[2] The Complaint used various phrases for the training provided to the PFAs, *e.g.*, "use of force program" (¶ 36), "behavior management" (¶ 36), "crisis intervention" (¶ 36) and "restraint training " (¶ 90).

[3] PFAs are licensed and supervised by OCFS. NY-SSL § 462; 18 N.Y.C.R.R. §§ 477.4, 482.3. *See generally* 18 N.Y.C.R.R. Ch. II, sub. C. Any private corporation that provides foster care must obtain written approval by OCFS before filing its certificate of incorporation. NY-SSL § 460-a; 18 N.Y.C.R.R. §§ 477.1, 477.4.

18 N.Y.C.R.R. § 441.3(c)(1) (emphasis added).

In the area of PFAs' restraint policy and related training, PFAs are given an administrative budget for such things as training, which, when provided by OCFS, is charged to the state-funded portion of the PFAs' administrative budget. OCFS merely requires that PFAs submit their restraint policies to OCFS for biannual approval (¶¶ 82-84). 18 N.Y.C.R.R. § 441.17. OCFS, *inter alia*, ensures that the staff of PFAs receives training in "safety and security procedures . . . [and] techniques of . . . child management including crisis intervention . . .." NY-SSL § 462. In order to use any physical restraint on a child in its care, a PFA must first submit its restraint policy to OCFS, including its plan for training its staff in the use of restraint. 18 N.Y.C.R.R. § 441.17(c)-(d)(4)(i)-(ii); 18 N.Y.C.R.R. § 441.17(h)(1)(iv).

Most significantly, there is no law or regulation requiring -- or even permitting -- OCFS to mandate that PFAs use any particular source of training, including outside vendors of restraint training.

The Allegations in the Complaint: The Respondents' Misconduct

OCFS, with the agreement and participation of Cornell, has "systematically refus[ed]" to allow PFAs to select their own restraint training vendors (¶¶ 34, 86, 88-90).[4] OCFS's coercion of PFAs to use Cornell's TCI

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[4] A 1994 "Memorandum of Agreement" ("MOA") between Cornell, acting on behalf of itself and CHE, and OCFS

program gives Cornell and OCFS a "monopoly situation within the State of New York" by forbidding PFAs the freedom to contract with Petitioner HWC or any other vendor of restraint training (¶¶ 36, 38, 90). As a result, PFAs expressing an interest in using HWC's (and others') programs have been coerced by OCFS into *not* using HWC or those other providers (¶¶ 71-73).

OCFS has also indicated directly to HWC that OCFS would simply not permit HWC (or any vendor other than Cornell) to provide restraint training to the PFAs (¶¶ 73, 88, 89). OCFS has specifically informed HWC that, although PFAs are theoretically free to negotiate with, and select, HWC for training programs, OCFS would ultimately refuse to approve any such arrangement, relying on 18 N.Y.C.R.R. § 441.17(c), which requires approval in writing by OCFS (¶¶ 84, 86, 88). PFAs "can only use [Cornell's] TCI as their use of force training provider or risk their license and ability to do business within the State of New York" (¶¶ 71-72, 88, 89), thus giving Cornell -- in conjunction with Cornell and CHE, "monopoly control" over the restraint training services provided to and purchased by PFAs in New York State (¶ 90).

The anticompetitive effect of Respondents' actions is not illusory. This arrangement between OCFS and Cornell has enabled Cornell to bill New York State over four times the amount Cornell charges its non-OCFS-regulated clients for the exact same TCI

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established the basic outline of the agreement (¶¶ 91-92; A-141 - A-154).

training (¶¶ 40, 89-92; PrBr[5] at 3, 15). The cost of this training, although initially paid by OCFS, is ultimately absorbed by the PFAs through a corresponding reduction in their administrative budget allotment. Moreover, OCFS, Cornell and CHE all benefitted financially from these artificially inflated prices because federal reimbursement has covered 75% of the cost of this training (¶¶ 91-92, 96-97; PrBr at 15 n.9, 30-32; RepBr[6] at 15 n.15, 29, 37 n.32). Hence, instead of seeking competitive prices as required by federal and state law, OCFS had a strong incentive to favor the high prices for the TCI training (and the exclusion of other vendors) because OCFS has been repaid most of the "cost" of Cornell's overpriced TCI training under Title IV-E of the Social Security Act (¶¶ 14, 35; PrBr at 30-32; RepBr. at 15,29, 37 n.32).[7]

This exclusive arrangement has also suppressed

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[5] "PrBr" citations are to Petitioner's Corrected Brief, submitted to the Second Circuit on July 10, 2006.

[6] "RepBr" citations are to Petitioner's Reply Brief, submitted to the Second Circuit on October 6, 2006.

[7] *See also* Amended Complaint in *United States of America ex rel. Chapman v. Cornell University, et al.*, 1:04-CV-1505 (N.D.N.Y. 2005)("*Qui Tam* Complaint"). The *Qui Tam* Complaint was filed by Bruce Chapman, HWC's president, pursuant to the False Claims Act, 31 U.S.C.A. §§ 3729 *et seq.* The allegations of the *Qui Tam* Complaint, brought in favor of the Government, are that Cornell, CHE and OCFS submitted false claims for reimbursement of the costs of TCI training under Title IV-E of the Social Security Act, by, *inter alia*, violating federal regulations regarding competitive pricing requirements for using outside vendors.

quality competition (A-174 - A-176; A-253 - A-257; PrBr at 15; http://www.aichhorn.org/aichhome2.html). For example, a February 12, 2003 article from *New York Teacher* explained that New York State United Teachers chose HWC's restraint training program over others because "it met more of the needs expressed during focus groups" (A-256).

Respondents did not present any pretense of some putative goal of efficiency, quality or any legitimate interest in imposing the substantially more expensive TCI program on the PFAs. Respondents did not even deny that this was manifestly anticompetitive behavior, conceding below that the Complaint "may be broadly and liberally construed to alleged [sic] anticompetitive conduct" (Docket No. 51 at 15). They also pointed to the ongoing 14-year Cornell/CHE-OCFS relationship and the MOA, which expressly concedes as one of its goals the maximization of federal funding for the sale of TCI (¶¶ 91-92; A-141; RepBr at 7-10, 19).

The Decisions Below

HWC had only one chance to plead its antitrust claims, as the District Court dismissed them with prejudice, concluding that the alleged relevant market was underinclusive, and rejecting the arguments of per se violations.[8]

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[8] The Complaint also stated federal copyright claims, alleging that OCFS infringed upon HWC's and Mr. Chapman's copyrighted training materials. The District Court dismissed the copyright claims, also with prejudice (A-296, A-316). The Second Circuit reversed the judgment dismissing the copyright

The Second Circuit affirmed, though acknowledging that a dismissal of an antitrust complaint without leave to amend is appropriate only "in extraordinary circumstances." The Second Circuit decision did not review HWC's allegations that an actual anticompetitive effect resulted from both the supracompetitive pricing and exclusion of competition, nor HWC's contention that per se liability might be shown through discovery. The Court simply held that HWC had failed to allege a "properly defined" relevant market, which it found fatal to all of HWC's antitrust claims.[9]

The Second Circuit denied Petitioner's Petition for Panel Rehearing and Petition for Rehearing *En Banc* on February 11, 2009.

REASONS FOR GRANTING THE PETITION

I. THE DEFINITION OF A RELEVANT MARKET IS NOT ESSENTIAL TO A SECTION ONE CLAIM WHERE THE COMPLAINT ALLEGES ACTUAL DETRIMENTAL EFFECTS ON COMPETITION THAT SUBVERTED BUYERS' CHOICES AND DISTORTED

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claims, which, together with a number of supplemental state law claims, are now before the District Court.

[9] All Respondents asserted antitrust state action immunity and OCFS asserted Eleventh Amendment immunity as well. The District Court expressed a negative view of these defenses, but ultimately did not rule on them, nor did the Second Circuit.

PRICING

Introduction

Petitioner sought to cast its antitrust claims both as a rule of reason case, generally requiring a relevant market in the Second Circuit, and, in the alternative, as a per se case. It was unable to satisfy the District Court and the Second Circuit, despite the Complaint's allegations of very specific -- and *actual* -- adverse effects on competition, including prices charged by Cornell that *quadrupled* what Cornell charged its non-OCFS-regulated customers, thus injuring competition and also damaging Petitioner. When challenged by Respondents' motions to dismiss, Petitioner fought for rule of reason liability based upon an asserted relevant market circumscribed by the regulatory environment of the New York State-licensed PFAs -- *i.e.*, with the requirement of licensing by OCFS, combined with OCFS's continuing review and requisite approval of their training policy and training vendor. Likewise, Petitioner asserted various per se theories of liability.

Rule of Reason Liability

As long ago as *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 110, 104 S.Ct. 2948, 2965 (1985) ("*NCAA*"), this Court has held that a Section One case can go forward even absent a detailed analysis of "market power," given obvious anticompetitive effects from the challenged action. As Justice Stevens further wrote in *NCAA*, "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." 468 U.S.

85, 109, 104 S.Ct. 2948, 2964 (1985). Both the Solicitor General and Professor Areeda agreed with such an analysis, Professor Areeda noting that "the rule of reason can sometimes be applied in the twinkling of an eye." *Id.*, 468 U.S. at 110 n.39, 104 S.Ct. 2965 n.39, quoting P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981). The Solicitor General observed that "in the market for television programming -- no matter how broadly or narrowly the market is defined -- the NCAA television restrictions have . . . *subverted* viewer *choice*, and *distorted pricing*" and thus in such circumstances, "a lengthy analysis of market power is not necessary." *Id.*, 468 U.S. at 110 n.42, 104 S.Ct. 2965 n.42. *See also Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009 (1986) ("*Indiana*").

The Consequence of Allegations of Specific Actual Detrimental Effects

In *Indiana*, the Court reiterated that the definition of a relevant market, as a prerequisite to demonstrating market power, is not universally required in all Section One rule of reason cases. This is so because market power itself is not always a prerequisite to a Section One claim. The Court in *Indiana* held, in pertinent part:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual

> detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."

Indiana, 476 U.S. at 460-61, 106 S.Ct. at 2019, quoting 7 P. Areeda, Antitrust Law ¶ 1511, p. 429 (1986).

Professor Sullivan, as well, has urged *actual* anticompetitive effects as the *optimal* standard by which to test market power. He concludes that market share (which requires definition of a relevant market) is only a "second-best" test for determining whether market power exists, whereas a "universal measure of market power," the so-called "Lerner Index," would actually determine how long a seller is able to sustain a relatively high markup. Sullivan concludes:

> Successful use of this method would eliminate the need for defining the market. Market share would become irrelevant if it could be established that a market participant was charging a price that could only be consistent with market power. Put another way, if a firm can sustain prices significantly in excess of marginal cost, the market would have to be defined in a way that confirms the existence of this power.

L. Sullivan & W. Grimes, The Law of Antitrust: An Integrated Handbook § 26a (2000) ("Sullivan").

Justice Stevens's opinion in *NCAA*, adopting the

logic of Areeda and the Solicitor General, makes patent the unreasonableness of the dismissal of this case. Applying the facts of this case to the above words of the Solicitor General quoted in *NCAA*, "[I]n the market for providing restraint training -- no matter how broadly or narrowly the market is defined -- the restrictions of OCFS and Cornell have . . . *subverted* the PFAs' choice, and *distorted pricing*." *See NCAA*, 468 U.S. at 110 n.42, 104 S.Ct. 2965 n.42.

The distortion of price resulting from Respondents' actions is detailed above. The subversion of choice (and, as Petitioner has alleged, a diminution of quality competition) is also present. *See* PrBr 3, 12-15. Restraint training vendors have simply accepted that Cornell's TCI is "mandated" by New York State. *See* "The Allegations in the Complaint: The Respondents' Misconduct," *supra*.

It is understandable why the District Court and Second Circuit would be reluctant to use per se categorization for a novel case with an unusual regulatory scheme.[10] However, that does not mean that the rule of reason analysis must undergo a tortuous relevant market calculus before reaching a conclusion about the anticompetitive effect of the antitrust misconduct alleged here -- especially at the pleading stage! Indeed, as this Court held in *California Dental Assoc. v. F.T.C.*, 526 U.S. 756, 779-80, 119 S.Ct. 1604,

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[10] In the Second Circuit, Petitioner did not abandon potential per se categorizations, but asserted that, given the uniqueness of the case, discovery might be required before such a determination could be made. PrBr at 36.

1617 (1999), citing *NCAA*, *supra*:

> The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "per se," "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that "there is often no bright line separating per se from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called " per se " condemnation is justified. *Id.*, at 104, n. 26, 104 S.Ct. 2948. "[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same-whether or not the challenged restraint enhances competition." *Id.*, at 104, 104 S.Ct. 2948.

In other words, the defendant's market power is implied where sufficient harm to competition is shown. As Professor Sullivan noted:

> [T]he Breyer opinion [concurring in part and dissenting in part in *California Dental*] can serve as a checklist for the points that a court or agency should address in explaining why it concludes that truncated analysis is sufficient: how the restraint can hurt competition; why any offsetting benefit claims are deficient; and why an inference of sufficient power

> to do market harm is warranted.

Sullivan § 5.3f. Justice Breyer's checklist would certainly help the Court focus on the non-commercial motive of OCFS and Cornell to impose high prices on the PFAs, given the high level of federal reimbursement. On this score too, Professor Sullivan's analysis is apt:

> A seller may also enjoy market power if the buyer can pass on the costs of a purchase to a third party that does not exercise cost discipline over the buyer's purchase decision. Such buyer pass-on may sometimes occur in health care, where many patients pay little or nothing to receive health care services that are covered by government or private health insurance.

Sullivan § 2.4e.

This Court's forthright admission in *California Dental*, quoted above, that its "categories of analysis . . . are less fixed than [their names] tend to make them appear," and its acknowledgment of "no bright line separating per se from Rule of Reason analysis" -- have simply not always been heard by the district courts and their reviewing Circuits. Instead of considering these cases and their progeny as "The Modern Synthesis of Per Se and Rule of Reason Analysis" (Sullivan § 5.3), the fact is that many courts have instead "often *blindly used* [market definitions] as a surrogate for more sensitive market analysis . . .." Sullivan § 2.6b.

The alleged antitrust misconduct, given full review, is indeed a candidate for per se categorization or, failing that, some equally strong condemnation using a rule of reason analysis, using factual analysis developed through limited discovery. Such theories of liability could well include: a collective or concerted refusal to deal; conspiracy with a licensor (OCFS) to eliminate competitors (HWC and others); vertical price-fixing by OCFS and Cornell, by virtue of their exercise of control over the PFAs; or a "regulatory tie-in." *See* Pr Br 35-40; RepBr 32-45 (discussing, *inter alia,* Section One liability arising out of state and local government-mandated legal monopolies). Notably, liability resulting in part from the actions of a state, acting with private parties, may be imposed for price and choice restrictions that are imposed horizontally on unwilling parties, such as the PFAs. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345-46 n.8 (1987) (holding Section One claims made out by state action compelling private parties to engage in anticompetitive behavior, calling this a "hybrid" restraint); *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004) (confirming that a state may not "becom[e] a participant in a private agreement . . . for restraint of trade").[11] This

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[11] *Freedom Holdings* rejected a claim of state action immunity where, as here, there was "no mechanism . . . whereby New York may review the reasonableness of the pricing decisions of [the parties]." 357 F.3d at 231 (internal quotation marks and citation omitted). Accordingly, the exhortation of two antitrust scholars is appropriate here: "Private parties who restrain trade pursuant to government directives do so at their peril." J. Lopatka & W. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 Yale J. Reg. 269, 292

Court has summarized,

> "The national policy in favor of competition cannot be thwarted by casting such a *gauzy cloak of state involvement* over what is essentially a private price-fixing arrangement."

Hoover v. Ronwin, 466 U.S. 558, 599 (1984), quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) ("*Midcal*") (other internal citations omitted).

II. THE CIRCUITS ARE SPLIT ON WHETHER A SECTION ONE CLAIM MUST ALLEGE A RELEVANT MARKET WHEN THE COMPLAINT ALSO ALLEGES SPECIFIC AND ACTUAL ADVERSE EFFECTS ON COMPETITION

In the wake of *Indiana*, *supra*, there is both a split among the Circuit Courts and even significant confusion *within* some of the Circuits -- including the Second Circuit -- as to whether a plaintiff who pleads or shows actual detrimental effects from antitrust misconduct is relieved from the burden of also specifically defining a market in order to assess a defendant's market power.

The majority of Circuit Courts, in following *Indiana*, have answered this question in the

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(2003).

affirmative. *Nilavar v. Mercy Health System-Western Ohio*, 244 Fed.Appx. 690, 695 (6th Cir. 2007) (holding that significant evidence of competitive harm obviates need to define geographic market and determination of market power, citing *Indiana*); *Spanish Broadcasting System of Fla., Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 1065, 1073 (11th Cir. 2004) (determining that only if the complaint does not allege "actual, sustained adverse effects on competition" must a reviewing court explore whether the complaint's allegations "define the relevant market and establish that the defendants possessed power in that market"), citing *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); *Brookins v. International Motor Contest Ass'n*, 219 F.3d 849, 852 (8th Cir. 2000) (holding that injury to competition is shown by either market power in a relevant market or an "actual adverse effect on competition"); *Flegel v. Christian Hosp.*, 4 F.3d 682, 688 (8th Cir. 1992) (holding a showing of either market power or "actual detrimental effects" shifts burden to defendant to demonstrate pro-competitive effects); *Spectators' Communication Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 225 (5th Cir. 2001) (holding that as purpose of market definition and market power is to determine potential for genuine adverse effect on competition, proof of actual detrimental effects can obviate need for such inquires).

The Ninth Circuit has likewise so held. "[The] failure to pinpoint precisely the relevant market through detailed analysis is not uniformly fatal to a claim under Sherman Act § 1." *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1448 (9th Cir.1988).

"Because market definition and market power *are merely tools* designed to uncover competitive harm, proof of 'actual detrimental effects, such as a reduction of output, can obviate the need ... [for] elaborate market analysis.'" *Id.*, 861 F.2d at 1448, quoting *Indiana*, 476 U.S. at 460-61. *See also Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd*, 924 F.2d 1484, 1489 n. 3 (9th Cir.1991); *Kemper v. Merle Norman Cosmetics, Inc.*, 15 F.3d 1086, 1994 WL 6601 (9th Cir. 1994).

Most of the above cases applied the *Indiana* concept at advanced stages of litigation well beyond the initial pleadings, such as in deciding summary judgment motions. Clearly, *a fortiori*, the logic of these cases applies even more strongly to a motion to dismiss -- the procedural stage at which Plaintiffs' antitrust claims were dismissed below. *Accord Spanish Broadcasting, supra.*

Other Circuits, however, are in conflict, holding fast to the requirement that a plaintiff must define a relevant market, even where *Indiana*'s "actual competitive effects" are shown or pleaded. *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717, 736-37 (7th Cir. 2004) (holding that Section One plaintiff may not "dispense entirely" with market definition).[12]

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[12] As the Seventh Circuit put it in *Republic Tobacco, supra* -- in what can only be described as a valiant attempt at harmonizing the cases -- "neither *Toys 'R' Us nor Indiana Federation of Dentists* allows an antitrust plaintiff to dispense entirely with market definition. Rather, these cases stand for the proposition that if a plaintiff can show the *rough contours* of

Still other Circuits have left open whether such "direct evidence" will obviate the need for a relevant market definition, or have issued conflicting and/or confusing statements on this issue. *Craftsmen Limousine, Inc. v. Ford Motor Co.* 491 F.3d 380, 388 (8th Cir. 2007) ("[A] plaintiff may put forth evidence of 'actual sustained adverse effects on competition' in the relevant market."); *Worldwide Basketball & Sport Tours v. NCAA*, 388 F.3d 955, 960-61 (6th Cir. 2004), *cert. denied*, 126 S.Ct.334 (2005) (conflicting with and never harmonized with a subsequent Sixth Circuit decision, *Nilivar*, supra, and holding that proof of actual anti-competitive effects did not necessarily obviate the eventual need for a formal market analysis under the rule of reason, but was instead merely limited to those situations involving "the abbreviated or quick-look analysis.").

In apparent frustration with the oversimplistic use of the categories of per se versus rule of reason, the Eleventh Circuit has even elucidated a rule for patent cases, finding that "neither the rule of reason nor the per se analysis is appropriate in this context." *Schering-Plough Corp. v. F.T.C.*, 402 F.3d 1056, 1065 (11th Cir. 2005).

The Second Circuit has traveled a somewhat tortured path in interpreting *Indiana*. For a time, at least in some opinions, the Second Circuit appeared to

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a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power . . .." 381 F.3d 717 at 737.

lean in the direction of allowing a showing of "actual anticompetitive effects" in lieu of a formal market analysis in rule of reason cases.

> Rule of reason analysis requires the antitrust plaintiff to bear the initial burden of demonstrating that the defendants' conduct or policy has had a substantially harmful effect on competition. The plaintiff may satisfy this burden without "detailed market analysis" by offering "proof of actual detrimental effects . . .."

Capital Imaging Associates, P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 546 (2d Cir. 1993), quoting *Indiana*, 476 U.S. at 460-61, 106 S.Ct. at 2019.

The panel opinion below cited *Todd v. Exxon Corp*, 275 F.3d 191 (2d Cir. 2001) for the general rules for defining a relevant product market, thus appearing to side with the Seventh Circuit and deviating from the "majority interpretation" of *Indiana*. However, somewhat ironically, *Todd* itself, following *Capital Imaging*, adopted this view of "actual adverse effect" substituting for a precisely defined relevant market that was posited in *Capital Markets*, stating:

> If a plaintiff can show that a defendant's conduct exerted an *actual adverse effect on competition*, this is a strong indicator of market power. In fact, this arguably is *more direct evidence of market power* than calculations of elusive market share figures.

Todd, 275 F.3d at 206. Indeed, *Todd* seemed to go even further:

> In this Circuit, a threshold showing of market share is not a prerequisite for bringing a § 1 claim. *See K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir.1995). "If a plaintiff can show an actual adverse effect on competition, such as reduced output ... we do not require a further showing*207 of market power." *Id.* (citation omitted); *see also Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 546 (2d Cir.1993) (explaining that plaintiff may avoid a " 'detailed market analysis' by offering 'proof of actual detrimental effects, such as a reduction of output' ") (quoting *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986)).

275 F.3d at 206-07.

Since *Todd*, many Second Circuit decisions have not been clear and have even conflicted with *Todd* in two respects. First, some decisions have stated the rule as requiring *both* a finding of "market power" *and* "substantial adverse effects on competition, such as increases in price, or decreases in output or quality." *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003). Even in *Visa U.S.A.*, however, the Second Circuit recognized that "[s]ome authorities suggest that the market power requirement is unnecessary[,]" citing *Indiana*, *NCAA* and its own decision in *K.M.B.* (quoted in *Todd*, *supra*). *Id.* at 238 n.4. Ultimately, even

though "some authorities" included *two opinions of this Court*, the Second Circuit in *Visa U.S.A.* found that, because the district court had found market power in the relevant markets, "[w]hether market power is a necessary element is of no moment here . . .." *Id.*

What the Second Circuit "ducked" in *Visa U.S.A.*, it was confronted with in the case at bar below. After and despite *Todd*, *Visa U.S.A.* and other decisions, the Court repeated the requirement for a showing of "actual anticompetitive effects" *in* the relevant market. On still other occasions, the Second Circuit has summarily lumped together the requirement of showing "an actual adverse effect on competition" with such taking place in a "relevant market." *E.g.*, *George Huag Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2d Cir. 1998). It appears that in Second Circuit, the pendulum has swung in favor of a very strict test, with a three-step process:

> First, the plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. Then, if the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. Should the defendant carry this burden, the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.

In re Ciprofloxacin Hydrochloride Antitrust Litigation, 544 F.3d 1323, 1332 (2d Cir. 2008),[13] quoting *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (other internal citations omitted). *See also Madison Square Garden, L.P. v. National Hockey League*, 270 Fed.Appx. 56 (2d Cir. 2008) (same); *E & L Consulting, Ltd. v. Doman Industries Ltd.*, 472 F.3d 23, 31 (2d Cir. 2006) (holding "[t]he complaint simply does not allege, therefore, 'that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market,'" citing *Capital Imaging*, 996 F.2d at 543 (emphasis in original); *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, 386 F.3d 485, 506-07 (2d Cir.2004) (same).

Hence, Petitioner became essentially "marooned" between per se theories and the rule of reason requirement of a relevant market, while making an effort to meet the definition of either or both theories, based upon Second Circuit precedent.[14]

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[13] The use of the phrase "actual adverse effect on competition as a whole in the relevant market" seems wholly at odds with *Indiana*. The phrase, at least in haec verba, is only found in Second Circuit decisions.

[14] Petitioner persists on the availability of per se categories for the actions of the Respondents, while aware that such a unique fact pattern as this case presents may not predispose the Court to endorse a per se category at the pleading stage. *See* PrBr at 36-37; RepBr at 44 n.36. In the total absence of any assertion of a pro-competitive or other salutary purpose for the OCFS/CHE-Cornell restraint on competition among training vendors for training the staff of 160 PFAs in New York State, it is hardly a stretch to classify it as "conclusively presumed to be unreasonable and therefore

Of course, whether showing actual anticompetitive effects obviates the need to allege a relevant market, or is simply another way of proving market power, the record below demonstrates real market "power" on the part of the Respondents, in that Cornell has been able to charge the PFAs, through OCFS, four times the price Cornell itself charges its non-OCFS-regulated customers. Hence, whatever general rules may be emerging in this regard, *this case* depicts collective conduct that has allowed the coercion on the PFAs of the selection of one vendor to the exclusion of others, including HWC. The dismissal with prejudice of the Complaint was thus wholly inconsistent with this Court's Section One jurisprudence.

Regardless of how courts have interpreted *Indiana*, any continued requirement of a precise definition of relevant market at the pleading stage simply encourages premature and improper dismissals of meritorious Section One claims, as is the case here. As the Ninth Circuit stated in *Oltz*, "[d]efining the market is *not the aim of antitrust law* . . . the failure to pinpoint precisely the relevant market through detailed market analysis *is not uniformly fatal to a claim under Sherman Act § 1*." 861 F.2d at 1448 (emphasis added). The resultant uncertainty (and even confusion), intra-Circuit, as well as inter-Circuits, supports this Petition. *See, e.g., Northwest Wholesale, supra*, 472 U.S. at 289,

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illegal." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289, 105 S.Ct. 2613, 2617 (1985). Such a categorization is best dealt with after discovery, as noted.

105 S.Ct. at 2616 (1985), where this Court granted certiorari "in an area of antitrust law that has not been free of confusion." This Court should grant this petition to resolve the conflict -- and at least diminish somewhat the outright confusion as to whether a relevant market need be shown or even pleaded where, as here, actual detrimental effects have been asserted in Petitioner's first -- and only -- antitrust Complaint alleging Section One violations.

CONCLUSION

The Decision of the United States Court of Appeals should be reversed, its Judgment vacated and the case remanded for further proceedings.

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
1:04-CV-867

BRUCE CHAPMAN; and HANDLE WITH CARE BEHAVIOR MANAGEMENT SYSTEM, INC.,

Plaintiffs,

vs

NEW YORK STATE DIVISION FOR YOUTH; NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICES; JOHN JOHNSON, Commissioner of New York State Office of Children and Family Services and former Commissioner of the New York State Division for Youth, in his Official and Individual Capacity; MARGARET DAVIS, Former Director of Training for the New York State Division for Youth, and former Director of Training for New York State Office of Children and Family Services, in her Official and Individual Capacity; PATSY MURRAY, Former Associate Training Technician for the New York State Division for Youth, and Current Position as Trainer for New York State Office of Children and Family Services, in her Official and Individual Capacity; CORNELL UNIVERSITY; JEFFREY LEHMAN, President of Cornell University, in his Official and Individual Capacity; DOCTOR HUNTER RAWLINGS, III, Former President of Cornell University, in his Official and Individual Capacity; NEW YORK STATE COLLEGE OF HUMAN ECOLOGY; FAMILY LIFE DEVELOPMENT CENTER; RESIDENTIAL CHILD CARE PROJECT; THERAPEUTIC CRISIS INTERVENTION;

MARTHA HOLDEN, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in her Official and Individual Capacity; MICHAEL NUNNO, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer, and Coordinator, in his Official and Individual Capacity; HILLSIDE CHILDREN'S CENTER; DENNIS RICHARDSON, President, and CEO of Hillside Children's Center, in his Official and Individual Capacity; DOUGLAS BIDLEMAN, Employee of Hillside Children's Center, and Therapeutic Crisis Intervention Trainer, in his Official and Individual Capacity; and JOHN DOE, 1 through 99,

Defendants.

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DAVID N. HURD
United States District Judge

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

Plaintiffs, Handle With Care Behavior Management System, Inc. ("HWC") and its president, Bruce Chapman ("Chapman", collectively "plaintiffs"), market a behavior management program which is used by persons who must physically restrain others. The allegations involve the misuse of plaintiffs' program and related conduct which plaintiffs allege affects the market for such services. The action is brought against three sets of defendants who have filed their motions accordingly.

The "state defendants" include New York State Office of Children and Family Services ("OCFS"), which assumed the functions of two other defendants in 1998 - New York State Division of Youth and Family Services ("DFY"); and New York State Department of Social Services ("DSS").[1] Defendant John Johnson was the former Commissioner of DFY, and now serves as the Commissioner of OCFS. Defendant Margaret Davis was the Director of Training for DFY, and now serves as the Director of Training for OCFS. Defendant Patsy Murray was an Associate Training Technician for DFY, and now serves as a Trainer for OCFS.

There are nine "Cornell defendants." Plaintiffs bring suit against Cornell University itself and two of its presidents: Jeffrey Lehman, a former president; and Hunter Rawlings III, its current president. Defendant New York State College of Human Ecology is a statutory college of State University of New York (the "College"). Three defendants are alleged

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[1] DFY operated juvenile facilities. DSS supervised child care providers.

subsidiaries of the College: The Family Life Development Center; The Residential Child Care Project; and Therapeutic Crisis Intervention ("TCI"). Finally, Martha Holden and Michael Nunno are Project Directors of The Residential Child Care Project and TCI Trainers and Coordinators.

The third set of defendants are referred to as the "Hillside defendants." Hillside Children's Center ("HCC") is a private childcare provider and residential treatment center. Plaintiff asserts claims against HCC, its president, Dennis Richardson, and its Coordinator for Sociotherapy Training, Douglas Bidleman.

Plaintiffs brings ten causes of action. The First through Fifth causes of action are brought against the state defendants: First cause of action, Copyright Infringement, 17 U.S.C. §§ 101 et. seq.; Second cause of action, Breach of Contract; Third cause of action, Fraud; Fourth cause of action, Conversion; and, Fifth cause of action, Tortuous Interference with a Business Relationship. The Sixth cause of action is brought only against the Hillside defendants for breach of contract.

The Seventh through Tenth causes of action are brought against all the defendants: Seventh cause of action, Monopolies, Restraint of Trade and Unfair Competition; Eighth cause of action, Conspiracy to Monopolize and Restrict Trade; Ninth cause of action, Misappropriation Tort for Business Scheme, Tort of Trade Secret Service Mark Dilution, Unfair Competition at Common Law; and Tenth cause of action, Unjust Enrichment.

The First, Seventh and Eighth causes of action are federal claims. The remaining causes of action are state law claims under supplemental jurisdiction.

The state and Cornell defendants move pursuant to Fed. R. Civ. P. 12 (b) to dismiss the

complaint as it pertains to them. The Hillside defendants move to dismiss the complaint pursuant Fed. R. Civ. P. 12 (c) and, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiffs oppose. Oral argument was heard on February 28, 2005, in Albany, New York. Decision was reserved.

II. FACTS

New York State, through OCFS, formerly DFY and DSS, operates juvenile facilities and supervises child care providers within the state. It is sometimes necessary to "physically restrain juveniles in certain circumstances; for example when a juvenile threaten[s] an immediate injury to themselves, a DFY staff member, or other juveniles." (Docket No. 1, Complaint, ¶24.) ("Complaint at __".) To ensure the safety of the juveniles, child care providers must use state approved techniques.

> Pursuant to 18 N.Y.C.R.R. § 441.17 Restraint of children in care:
>
> (c) An authorized agency shall not use any method of restraint unless it has submitted its restraint policy to the department and such policy has been approved in writing by the department in accordance with subdivision (d) of this section.
>
> (3) The duration of department approval will be for a period of two years.

OCSF is charged with approving and regulating the training of such techniques pursuant to N.Y. Exec. Law § 501, which lists the functions, powers and duties

of OCFS. Listed among those duties, the statue explicitly requires the agency :

> 12. To promulgate regulations concerning standards for the protection of children in residential facilities and programs operated or certified by the division, from abuse and maltreatment. Such standards shall include the prevention and remediation of abuse and maltreatment of children in such residential facilities or programs, including procedures for:
>
> . . .
>
> . . . the characteristics of children in care and techniques of group and child management including crisis intervention. . .
>
> . . .
>
> The division . . . shall monitor and supervise the provision of training to such administrators, employees, volunteers, children and consultants.

Chapman, now president of HWC, has been involved in training others to use restraint techniques since the 1980s. The HWC program consists of a series of manuals, a performance based training program, and audio visual productions. (Complaint at ¶ 44.) Chapman obtained a copyright for HWC trainer's manual entitled "Handle with Care - A Revolutionary Approach to Behavior Management" and all written HWC materials were marked with a copyright notification. Id. at ¶ 45. "Child care providers and residential treatment centers frequently employ

vendors like HWC to provide a use of force program and train staff." Id. at ¶33. In fact, DFY contracted with Chapman for training services in 1987. (Docket No. 60, Goglia Dec. Ex. A.)

Prior to 1998, DFY was the agency responsible for the care and welfare of all juveniles in New York State's custody; and one of its responsibilities involved creating procedures and training staff in restraint techniques. Id. at 24. Between 1994 and 1996, while employing restraint techniques, DFY staff inflicted injuries on one juvenile and killed another. Id. at ¶¶ 26, 58. Thereafter, "DFY retained HWC to proved a safe use of force program and to train DFY staff in that program which included restraint techniques." Id. at ¶ 27. Defendant Director of Training Margaret Davis worked on the terms of the agreement. Id. at ¶ 60. "On or about April 23, 1997 a contract was entered into between [p]laintiff and DFY, whereby [p]laintiff agreed to deliver 12 days of training, certify staff as instructors and provide written and audio visual training materials." Id. at ¶ 50. According to plaintiff, each staff person signed contracts acknowledging that their ability to train [p]laintiffs program terminated one year post training. Id. at ¶ 62. Plaintiff asserts that the contract also limits the use of training materials to one year. Id. at ¶ 51.

After DFY merged into OCFS in 1998, OCFS continued to use HWC's program and techniques, allegedly, without license or permission and has been reproducing without license, authorization, permission or compensation to plaintiff. Id. at ¶¶ 30, 46. Plaintiffs' requests for the return of the materials have been ignored. Id. at ¶ 68.

In October of 2001, plaintiffs entered into a training contract with HCC. Id. at ¶ 76. The contract

provided that "the Agency and/or employee of the Agency receiving Handle With Care's program and training acknowledges that the Program and Training contain confidential information and trade secrets developed and owned by Handle with Care and agrees to treat such information as confidential." Id. at ¶ 77 (quoting the contract.) On or about August 2002, plaintiffs discovered that HCC and Douglas Bidleman, a HCC training coordinator, "appeared in TCI's training manual and video illustrating proprietary HWC information covered under the confidentiality clause of the contract." Id. at ¶ 79.

"New York State owns its own use of force program in conjunction with Cornell University and the State of New York College of Human Ecology. . . . This program is called TCI and is administered and controlled by Cornell University." (Complaint at ¶ 35, 87.)[2] Plaintiff alleges that TCI illegally incorporates "techniques, methods, materials, and information unique to and identified with HWC's program and training." Id. at ¶ 37. Plaintiff further complains that TCI and HWC are competitors and TCI's possession of HWC property is giving TCI an unfair advantage.

This action was prompted in part by an apparent policy change at OCFS wherein OCFS now refuses to allow agencies to submit use of force policies other than the policy promulgated by TCI. Id. at ¶¶ 34,36. This policy change, allegedly attributable to OCFS, Cornell, the College and TCI, "insure[s] that the

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[2] According to the Cornell defendants, Cornell owns the program but New York State has unlimited use of the materials. (Docket No. 51, Cornell's Mot. to Dismiss, 11.)

State's program has exclusive access to the market." Id. at ¶ 73. "OCFS has created an environment whereby private child care providers can only use TCI as their use of force training provider or risk their license and ability to do business within the State of New York." Id. at ¶ 88. This precludes plaintiffs and other vendors from the marketplace and creates a TCI monopoly in providing child restraint training services. Id. at ¶ 90.

III. DISCUSSION

A. Motion to Dismiss

In deciding a Rule 12(b)(6) motion, a court "must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant." Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994); see also Kaluczky v. City of White Plains, 57 F.3d 202, 206 (2d Cir. 1995). However, conclusory allegations that merely state the general legal conclusions necessary to prevail on the merits and are unsupported by factual averments will not be accepted as true. See, e.g., Clapp v. Greene, 743 F. Supp. 273, 276 (S.D.N.Y. 1990); Albert v. Carovano, 851 F.2d 561, 572 (2d Cir. 1988). The court's function is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). Therefore, the defendants' present motions will only be granted if it appears that the plaintiffs can prove no set of facts in support of their claims that would entitle it to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Goldman, 754 F.2d at 1065.

B. Copyright Claims

The First cause of action against the state defendants alleges that "OCFS (formally DFY), without license, assignment or permission, took [p]laintiffs copyrighted materials, and has been reproducing such protected materials without license, authorization, permission or compensation to [p]laintiff." (Complaint at ¶ 46.) It is not disputed that the state defendants copied the materials. At issue is whether or not they were licensed to do so. This determination turns on the non-exclusive license to use the materials granted in the parties' contract. The state defendants assert that they were expressly authorized to copy HWC materials and "[a] copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement." Graham v. James, 144 F.3d 229, 236 (2d Cir. 1998). Plaintiffs assert that the contract contains a one-year limitation on defendants' license to reproduce the materials.

"In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference." Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991). The complaint repeatedly refers to the contract, but plaintiffs declined to attach a copy to the complaint. Defendants included a copy as an exhibit and plaintiffs note that the exhibit "appears to be a copy" of the contract at issue. The contract is properly considered on this motion.[3] I. Meyer Pincus & Assoc., P.C. v.

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[3] As federal jurisdiction is lacking, the state law breach of contract claims will be dismissed without prejudice and

Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991) (plaintiff not permitted to evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach a document); Yak v. Bank Brussels Lambert, 252 F.3d 127, 131 (2d Cir. 2001).

In 1997, Chapman entered into the contract at issue with DFY. He agreed to "update and recertify existing Crisis Management/Physical Restraint trainers in the techniques encompassed in the Handle with Care Program." (Docket No. 60, Goglia Dec. Ex. B, 1.) The contract called for Chapman to deliver 12 days of training over a three-month period to approximately 120 state employees. Id. at 1-2. The contract also provides: "The Contractor acknowledges and agrees that the Division has the right to reproduce all training materials." Id. at 2. This is a logical inclusion because Chapman was training trainers who would require the materials.

Despite plaintiffs' repeated assertions, the contract simply does not contain a provision limiting this license to use the materials to one-year or any other duration of time. The contract, drafted by Chapman, is clear and unambiguous. Plaintiffs do not argue that it suffers any legal defect or otherwise attack the validity of the agreement. Plaintiffs never

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no comment is required as to those claims. However, it is noted that plaintiff also declined to attach the contract relevant to the Sixth cause of action alleging breach a contract against the Hillside defendants. The Hillside defendants claim to have no knowledge of that contract. In response to defendants' statement, plaintiff notes only that defendants have not cited a case or rule for the proposition that the contract must be attached to the complaint. This response sullies the spirit of liberal pleading requirements of Fed. R. Civ. P. 8 and taps the resources and patience of all involved in the litigation.

assert that any other representations were made or agreed upon extraneous to the contract.

Dismissal is proper where the documents upon which a claim is based show on their face an absence of any grounds for relief. Feick v. Fleener, 653 F.2d 69, 75 (2d Cir. 1981). Plaintiffs' allegations are contradicted by the contract itself and are therefore insufficient to defeat a motion to dismiss. Matusovsky v. Merrill Lynch, 186 F. Supp. 2d 397, 400 (S.D.N.Y. 2002) (citing Broadway LLC v. Credit Suisse First Boston, No. 00 Civ. 5773 2001 U.S. Dist. LEXIS 4875, *27 (S.D.N.Y. Apr. 20, 2001)). The copyright claim will be dismissed as plaintiffs have not demonstrated a limitation on defendants non-exclusive license to reproduce materials and therefore failed to state a claim upon which relief may be granted.[4]

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[4] As noted above, jurisdiction will be declined over the state law claims and thus plaintiffs' Second cause of action for breach of contract will be dismissed. It is noted however that it suffers from the same deficiency as the copyright claim because it is based on allegations that state defendants acted beyond a durational limitation: (1) "The contract provided that DFY to reproduce (sic) such written and audio visual materials for the benefit of its trainers and staff for a period of one year commencing on the date of training and ending on the training's one year anniversary." (Complaint at ¶ 51.); (2) "The contract also provided that DFY trainers could train DFY staff in Plaintiffs program for a period of one year commencing on the date of training and ending on the training's one year anniversary." (Complaint at ¶52.); and, (3) defendant has continued to reproduce the materials and continued to train staff beyond the one-year limitation (Complaint at ¶¶ 52, 53.)

C. Antitrust claims

In the Seventh and Eighth cause of action the plaintiffs bring antitrust claims against all of the defendants.[5] In short, plaintiffs allege that the Cornell defendants developed the TCI program which the state defendants require child care providers to purchase. Thus, these defendants have participated or acquiesced in a plan whereby TCI obtained a monopoly over the right to train private child care providers in New York State. (Complaint at ¶ 95.) Plaintiffs characterize this conduct under the Seventh cause of action as a monopoly, restraint of trade and unfair competition. Plaintiffs allege that essentially the same conduct constitutes a conspiracy to monopolize and restrain trade in the Eighth cause of action. Id. at ¶ 95.

These claims are brought pursuant to the Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1 and 2.[6] Section 1 of the Sherman Act, makes unlawful "every contract, combination or conspiracy, in restraint of trade or

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[5] The Seventh cause of action never mentions the Hillside defendants. The Eighth cause of action simply lists them as conspirators. There are simply no allegations to support plaintiffs claims that the Hillside defendants participated in monopolization or conspiracy to monopolize the relevant market. Those claims are therefore subject to dismissal regardless of plaintiffs other pleading deficiencies. Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972).

[6] Plaintiffs clarified this portion of the pleading in opposition memorandum. (Docket No. 67, Pl.'s Opp'n Mem., at 10)

commerce among the several States." Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." The defendants, in chorus, present two grounds for dismissing the claims: state action immunity and failure to define a market that supports an antitrust claim.

1. Immunity

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." Parker v. Brown, 317 U.S. 341, 351 (1943). Therefore, "[a]bsent a clear indication from Congress, the States are entitled to immunity as an aspect of the federal system." Hybud Equipment Corp. v. City of Akron, Ohio, 742 F.2d 949, 954 (6th Cir. 1984). Immunity may be extended to private parties who act in concert with the state in affecting its policies. Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032, 1048 (2d Cir. 1986). Here the state defendants argue that they are entitled to Eleventh Amendment immunity, and the Cornell defendants argue that an extension of that immunity applies to their activities. As such, OCFS must be granted immunity in order for the private defendants to share in the benefit.

A state agency is entitled to immunity in one of two ways. First, the agency may be deemed an arm of the state in which the conduct of the agency is deemed the conduct of the state itself and is thus entitled to immunity. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 61-62 (1994). Second, immunity

may be conferred through what is known as "authorization." "Where the activity . . . 'is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization,' the application of the exemption [is not as clear and] requires a more searching analysis." Id. at 955. (quoting Hoover v. Ronwin, 466 U.S. 558 (1984)). "[T]he anticompetitive conduct of a nonsovereign state representative . . . require[s] a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation." Hoover, 466 U.S. at 569 (citation omitted).[7]

"[T]he 'clear articulation' label is not quite the hurdle that its language suggests because it has always been construed as synonymous with the foreseeability test." Automated Salvage Transp. v. Wheelabrator Envtl. Sys., 155 F.3d 59, 69 (2d Cir. 1998). "So long as the resulting anticompetitive activities are a foreseeable consequence of the state delegation, the 'clear articulation' standard has been met. To meet this requirement the party claiming the state action defense must show that the 'legislature contemplated the action complained of." Cine 42nd Street Theater Corp., 790 F.2d at 1043 (citations omitted).

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[7] "[T]he challenged restraint must be '[f]irst, one clearly articulated and affirmatively expressed as state policy'; [and] second, the policy must be 'actively supervised' by the State itself." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (quoting Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)). Active state supervision is not required where the actor is a state agency. Hallie v. Eau Claire, 471 U.S. 34, 46 n.10 (1985).

> [T]he enabling legislation need not explicitly authorize the exact actions undertaken. It is only necessary that the permitted actions produce anticompetitive consequences that foreseeably flow from the grant of state authority. That is, the enabling statute must affirmatively designate a particular area to be regulated, provide the methods of regulation, and create grounds for a reasoned belief that some anticompetitive activity could be envisioned.

Id. at 1043 -1044.

Defendants assert that OCFS is entitled to immunity on both grounds. In the instant case, it is not necessary to delve into the complex and murky analysis of whether or not the state exercises sufficient control over the agency for it to be deemed an arm of the state[8] or the intended scope of the legislative

[8] While it is clear that the state legislature and courts are arms of the state, classifying inferior subdivisions or agents can be exceedingly difficult. See Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law An Analysis of Principles and Their Application, ¶ 224 (b) (2002). Despite the intuitive sense that OCFS acts as the state itself, it is not ipso facto entitled to state immunity. "[T]he issue must ultimately depend on whether the sovereign power of the state is so involved in the organization and operation of the entity as to directly implicate the fundamental policy of federalism secured by the Eleventh Amendment." Daniel v. Am. Bd. of Emergency Med., 988 F. Supp. 127, 153 (W.D.N.Y. 1997) (citations omitted.)

> [T]he court [must] assess whether the entity constitutes an arm of a state by evaluating the

regulatory authority conferred on agency.[9] Even if

> degree of control and supervision over the entity, including the state's power of appointment and removal of officers or directors, any authority to approve or disapprove the actions of the entity, including its capacity to raise revenue for its own purposes, whether the entity is financially independent from the state, whether the state is responsible for the entity's obligations and liabilities, and the character of its functions, i.e., state-wide or local, are performed or served by the entity.
> Id. at 151-152.

The state defendants point to legislation granting OCFS extensive regulatory power, the fact that the Governor appoints the commissioners of OCFS and DSS, and cite Automated Salvage Transport, Inc. v. Wheelabrator Env'tl Sys.,155 F.3d 59, 70 (2d Cir. 1998) and Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 61(1994), in arguing for immunity.

A broad legislative grant of extensive regulatory power is not an obviously controlling factor. OCFS's powers do not seem more extensive than the home rule powers of municipalities, and those entities are not immune on that ground. Neither Hess or Wheelabrator offer much guidance. OCFS is clearly different from the bi-state agency operating a commuter railroad between states and the solid waste authority that maintains a vast system of solid waste management projects that were at issue in Hess and Wheelabrator. The nature of the activity is different, as is the extent of both government control and agency accountability to the public

[9] When a state agency, municipality, or other state subdivision claims state immunity from federal law, it must first identify a 'clearly expressed state policy' that authorizes its actions." Cine 42nd Street Theater Corp. v. Nederlander

OCFS was not immune under the Eleventh Amendment, plaintiffs have failed to state an antitrust claim under Fed. R. Civ. P. 12(b)(6). See Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law An Analysis of Principles and Their Application, ¶ 224 (2002) (noting that many antitrust allegations, like exclusive contracting, against state

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Organization, Inc., 790 F.2d 1032, 1043 (2d Cir 1986) (quoting Hallie, 105 S.Ct. at 1717). "The clarity of such policy is often a function of how broadly the legislation is drawn, with the existence of such policy being more readily discernible in narrowly drawn legislation. The legislation must contain an affirmative showing of intent, though it need do no more than authorize the challenged conduct." Id. (quoting Southern Motor Carriers Rate Conference v. United States, 105 S.Ct. 1721, 1729 (1985)).

As related above, OCFS is charged with broad powers of operation and regulation which have allegedly had anticompetive effects. An "adequate state mandate for anticompetitive activities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the [state] legislature contemplated the kind of action complained of.'" Wheelabrator, 155 F.3d at 69. (citations omitted).

In areas of zoning, economic development or regulation of commercial entities in regional areas to solve environmental problems, it is easy to infer that exercise of the agency's mandate will result in displacement of competitors. Here, under a plain reading, the legislation reveals the state's concern, and subsequent policy, that child care providers receive sufficient training in restraint techniques. While it may easily be inferred that the state is neutral or indifferent to the means by which this is accomplished, it is not the sort of mandate which leads to an inference that the state intends to trump federal antitrust policy.

sub-divisions will not violate anti-trust law, and where the substantive antitrust issue is clear, the logic of courts bypassing the state action question altogether).

2. Market Definition

"The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's 12(b)(6) motion." Found. for Interior Design Educ. Research v. Savannah College of Art & Design, 244 F.3d 521, 530 (6th Cir. 2001). "While the pleading standard under the federal rules is very liberal . . . the price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome." Id. (citation omitted.) "It is well-settled that an antitrust complaint must allege a relevant market in which the anti-competitive effects of the challenged activity can be assessed." Evac, LLC v. Pataki, 89 F.Supp.2d 250, 260-61 (N.D.N.Y. 2000) (citing Jefferson Parish Hospital. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)).

"In order to survive a motion to dismiss, a claim under the Sherman Act §§ 1 and 2, 15 U.S.C.S. §§ 1 and 2, must allege a relevant geographic and product market in which trade was unreasonably restrained or monopolized." Global Discount Travel Servs., LLC v. TWA, 960 F. Supp. 701 (S.D.N.Y. 1997); Jefferson Parish, 466 U.S. at 29; In re NASDAQ Market-Makers Antitrust Litig., 894 F. Supp. 703, 710-711 (S.D.N.Y. 1995). Otherwise, "it is impossible for a court to assess the anticompetitive effect of challenged practices." Re-Alco Industries, Inc. v. National Center for Health Educ., Inc., 812 F. Supp. 387, 392 (S.D.N.Y. 1993).

Accordingly, failure to define the relevant market constitutes grounds for dismissal. Discon Inc. v. Nynex Corp., 86 F. Supp. 2d 154, 161 (W.D.N.Y. 2000).

Plaintiffs argue that they have properly defined a relevant market, but first, that they are free from the burden of engaging in market analysis to demonstrate the effect of defendant conduct on the market because they have asserted per se claims. A per se claim is alleged when the alleged conduct falls within a "narrow range of behavior that is considered so plainly anti-competitive and so lacking in redeeming pro-competitive value that it is 'presumed illegal without further examination,' that is, it is illegal per se." Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 506 (2d Cir. 2004) (quoting Broad. Music, Inc. v. Columbia Broadcast System, Inc., 441 U.S. 1, 8 (1979)). It is true that claims of per se violations of the Sherman Act relieve plaintiffs of demonstrating anticompetitive effects under the burdensome multi-part rule of reason analysis applied to most claims. Id. at 507. However, plaintiffs cannot avoid the burden of meeting the standing requirement of alleging injury to competition, not simply injury to HWC, which, here, requires a properly defined market. See Discon, 86 F. Supp. 2d at 159 (citing Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341-44 (1990)); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)).

Moreover, plaintiffs have not alleged a per se violation of the Sherman Act. That characterization is applied to a short list of violations which generally includes naked horizontal price fixing, market allocation and output restrictions. See Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 62 (1st Cir. 2004). As will be

explained below, plaintiffs' allegations amount to a claim of illegal exclusive contracting, which is not a per se violation because such arrangements are frequently found to benefit competition. Id. at 62; Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 508 (2d Cir. 2004).

Turning to plaintiffs' definition of the relevant market. The complaint does not specifically purport to define the relevant market, but repeatedly refers to "training services to New York State child care providers." (Complaint at ¶¶ 90, 91, 95.) Plaintiffs' construction of the market is based on child care providers' need for state certification which involves OCFS's approval of a particular service provider.

On a motion to dismiss, the allegations complaint are taken as true and it is therefore presumed that OCFS refuses to grant approval of physical restraint programs other than TCI. OCFS therefore effectively exercises the child care providers' market choice in service providers. But then, it was OCFS that created the need for certification. At oral argument, plaintiff referred to the relevant market as the "OCFS market." This is not a proper antitrust market as it is defined in terms of the purchase(s) of a single -buyer, OCFS. See International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904, 909 (6th Cir. 1989); Discon, 86 F. Supp. 2d at 160. "[T]o define the relevant product market as that group of products over which defendants' anticompetitive conduct exercises control, . . . as an analytic matter, reads the market definition step out of the Sherman Act. " Discon, 86 F. Supp. 2d at 161 (citation omitted). Any anticompetitive effect resulting from allegedly biased purchasing decisions in the market must reflect

the total demand for restraint services as a whole, not just OCFS's demand.

Plaintiffs have not alleged that there is anything particular in the provision of training to OCFS child care providers such that OCFS' training needs and/or materials should constitute a market in and of itself. It is not that Cornell defendants have monopolized the "OCFS certification required market", but rather that OCFS, as a participant or consumer in the restraint services market, has simply entered into an exclusive contract with Cornell defendants. Absent some compelling reason to adopt plaintiffs' market construction, the agreement must be evaluated in the terms of the restraint services market as a whole.

Plaintiffs have not properly defined a relevant product market but rather have defined the product to meet plaintiffs' definition of the OCFS market. The market for physical restraint programs includes social service agencies, law enforcement agencies, correctional facilities, educational institutions, and even airlines. Some portion of the program consists of behavior management techniques which may or may not be distinguishable from use of force techniques. It is also apparent that the restraint techniques are not strictly applicable to children.

Because the product market has been defined to include only the purchases of OCFS it is not possible to evaluate the effect of the OCFS and TCI arrangement on other service providers or consumers. "The relevant product market includes all products reasonably interchangeable, determination of which requires consideration of cross-elasticity of demand." Re-Alco, 812 F.Supp. at 391. "In the context of a Fed. R. Civ. P. 12(b)(6) motion to dismiss, an antitrust complaint must either allege facts regarding

substitute products, distinguish among comparable products, or allege facts relating to cross-elasticity of demand; otherwise, dismissal is appropriate." Intellective, Inc. v. Mass. Mut. Life Ins. Co., 190 F. Supp. 2d 600 (S.D.N.Y. 2002).

Plaintiffs have not offered any theoretically reasonable explanation for restricting the product market to child care providers that require OCFS approval, or provided a sufficient factual predicate to support an inference that OCFS enjoys any substantial market power in the broader market for restraint services. This failure is fatal to their antitrust claims. See Evac, LLC v. Pataki, 89 F.Supp.2d 250, 260-61 (N.D.N.Y. 2000).

Plaintiffs' pleading of a geographic market is also fatally insufficient. Here, plaintiffs have narrowed the geographic market to child care providers in New York State, yet even plaintiffs seem constrained by that definition. Plaintiffs state that their customer base, child care providers, are national consumers of training services. (Complaint at ¶ 93.) Plaintiffs also note that HWC competes for national and international training contracts. Id. at ¶¶ 93, 98. Yet, plaintiffs have not attempted to describe a market in which defendants are affecting training services in a national market, let alone international market. The actual economic reality of the relevant market is no doubt larger than New York State and smaller than the entire international market, but plaintiffs have not provided sufficient facts to support any particular inference as to what it might be. See Evac., 89 F.Supp.2d at 261.

The antitrust claims will be dismissed as plaintiffs have failed to define a proper product or geographic market.

D. State Law Claims

"Pursuant to 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over state law claims where 'the district court has dismissed all claims over which it has original jurisdiction.'" Manhattan Telecomms. Corp. v. DialAmerica Mktg., 156 F. Supp. 2d 376, 384 (S.D.N.Y. 2001). Considering that the federal claims in this action are eliminated at the early pleading phase of the litigation, supplemental jurisdiction of the remaining state laws claims is declined, and those claims will be dismissed without prejudice. See Valencia v. Sung M. Lee, 316 F.3d 299, 305 (2d Cir. 2003) (citing 28 U.S.C. § 1367(c)); Martinez v. Simonetti, 202 F.3d 625, 636 (2d Cir. 2000) (directing dismissal of supplemental state law claims where no federal claims remained).

IV. CONCLUSION

Plaintiffs' copyright claim is not supported by sufficient facts alleging that the state defendants reproduced copyrighted materials without a license or authorization. Plaintiffs failed to adequately define a market to support the antitrust claims.

Therefore, it is

ORDERED that

1. Defendants' motions to dismiss the complaint are GRANTED;

2. The complaint is DISMISSED in its entirety, the First, Seventh, and Eighth causes of action stating federal claims are dismissed with prejudice, and, the remaining causes of action

stating state law claims are dismissed without prejudice.

The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

Dated: September 29, 2005
Utica, New York.

United States District Court

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED

SEP 29 2005

AT _____ O'CLOCK ____M
LAWRENCE K. BAERMAN, Clerk
UTICA

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: October 25, 2007 Decided: October 14, 2008)

Docket No. 05-7010-cv

BRUCE CHAPMAN AND HANDLE WITH CARE BEHAVIOR MANAGEMENT SYSTEM, INC.,

Plaintiffs-Appellants,

—v.—

NEW YORK STATE DIVISION FOR YOUTH, NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICE, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, JOHN JOHNSON, Commissioner of New York State Office of Children and Family Services, and former Commissioner of the New York State Division for Youth, in his official and individual capacity, MARGARET DAVIS, former Director of Training for the New York State Division for Youth, and former Director of Training for New York State Office of Children and Family Services, in her official and individual capacity, PATSY MURRAY, former Associate Training Technician for the New York State Division for Youth, and current position as Trainer for New York State Office of Children and Family Services, in her official and individual capacity, CORNELL UNIVERSITY, JEFFREY LEHMAN, President of Cornell University, in his official and individual capacity, DOCTOR HUNTER RAWLINGS, III, former President of Cornell University, in his official and individual capacity, NEW YORK STATE COLLEGE OF HUMAN ECOLOGY, FAMILY LIFE DEVELOPMENT

CENTER, RESIDENTIAL CHILD CARE PROJECT, THERAPEUTIC CRISIS INTERVENTION, MARTHA HOLDEN, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in her official and individual capacity, MICHAEL NUNNO, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in his official and individual capacity, HILLSIDE CHILDREN'S CENTER, DENNIS RICHARDSON, President and CEO of Hillside Children's Center, in his official and individual capacity, DOUGLAS BIDLEMAN, Employee of Hillside Children's Center and Therapeutic Crisis Intervention Trainer, in his official and individual capacity,

Defendants-Cross-Defendants-Appellees.

Before:

WALKER, STRAUB, and POOLER, *Circuit Judges.*

Plaintiffs-appellants seek review of an order of the United States District Court for the Northern District of New York (David N. Hurd, *Judge*) dismissing their copyright and antitrust claims pursuant to Fed. R. Civ. P. 12(b) and (c) and declining to exercise supplemental jurisdiction over their state law claims. The district court dismissed plaintiffs' copyright claims on the basis that a contract unambiguously granted the defendants a perpetual license to copy plaintiffs' materials. We conclude that the contract is ambiguous, and remand the case for further fact-finding on this issue. With regard to plaintiffs' antitrust claims, we agree with the district court that plaintiffs have failed to allege a plausible antitrust market. We therefore affirm the district court's order dismissing plaintiffs' antitrust claims with prejudice.

AFFIRMED in part; VACATED and REMANDED in part.

GUY L. HEINEMANN, Guy L. Heinemann, P.C. (Irene M. Vavulitsky, Guy L. Heinemann, P.C., and Hilary Adler, Law Offices of Hilary Adler, Gardiner, N.Y., *on the brief*), New York, N.Y., *for Plaintiffs-Appellants.*

ANDREA OSER, Assistant Solicitor General (Daniel Smirlock, Deputy Solicitor General, *on the brief*), for Eliot Spitzer, Attorney General of the State of New York, Albany, N.Y., *for Defendants-Appellees, New York State Division for Youth, New York State Department of Social Services; New York State Office of Children & Family Services, John Johnson; Margaret Davis, and Patsy Murray.*

NELSON E. ROTH (Valerie L. Cross and Norma W. Schwab, *on the brief*) Office of the University Counsel, Ithaca, N.Y., *for Defendants-Appellees, Cornell University, Jeffrey Lehman, Hunter Rawlings, III, New York State College of Human Ecology, Family Life Development Center, Residential Child Care Project, Therapeutic Crisis Intervention, Martha Holden, and Michael Nunno.*

DAVID H. WALSH, Petrone & Petrone, P.C., Syracuse, N.Y., *for Defendants-Appellees, Hillside Children's Center, Dennis Richardson, and Douglas Bidleman.*

JOHN M. WALKER, JR., *Circuit Judge*:

Plaintiffs-appellants Bruce Chapman and Handle With Care Behavior Management System, Inc., (collectively "HWC") market a training program ("Handle With Care") that teaches individuals a safe technique for physically restraining others. HWC sued three

groups of defendants alleging generally that they had infringed HWC's copyright and adversely affected the market for such restraint services in violation of the antitrust laws.

Specifically, HWC sued various New York state agencies and their officers and agents (collectively "the state defendants"). The state defendants include: the New York State Office of Children and Family Services ("OCFS"), which in 1998 succeeded the New York State Division for Youth ("DFY") and the New York State Department of Social Services ("DSS") also named as defendants; John Johnson, the former Commissioner of DFY and the current Commissioner of OCFS; Margaret Davis, the former Director of Training for DFY and the current Director of Training for OCFS; and Patsy Murray, a former Associate Training Technician for DFY and current Trainer for OCFS.

HWC also sued Cornell University and the New York State College of Human Ecology (the "College") and related persons and entities (collectively "the Cornell defendants"). The Cornell defendants include: Cornell University; Jeffrey Lehman, Cornell's then-current president; Hunter Rawlings III, Cornell's former president; the College and subsidiaries the Family Life Development Center, the Residential Child Care Project, and Therapeutic Crisis Intervention ("TCI"); and Project Directors of the Residential Child Care Project and TCI Trainers and Coordinators, Martha Holden and Michael Nunno.

Finally, HWC sued Hillside Children's Center ("HCC"), a private childcare provider and residential treatment center, and two of its officers, Dennis Richardson, HCC's president, and Douglas Bidleman, HCC's Coordinator for Sociotherapy (collectively "the Hillside defendants").

The state and Cornell defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the Hillside defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(c). The district court granted both motions as to all of plaintiffs' federal claims and declined to exercise supplemental jurisdiction

over the remaining state law claims. The federal claims dismissed were: (1) copyright infringement against the state defendants; and (2) conspiracy to monopolize and restrain trade, together with monopoly, restraint of trade, and unfair competition, against all defendants.

The district court dismissed plaintiffs' copyright claim on the basis that the contract at issue unambiguously granted the state defendants the right to copy plaintiffs' materials indefinitely. We disagree with that conclusion, find the contract ambiguous, and remand the case to the district court to determine the duration of the license to copy plaintiffs' materials granted under the contract.

With regard to the antitrust claims, the district court held that the plaintiffs failed to offer a plausible relevant market in which the defendants monopolized the trade for restraint services or engaged in restraint of trade or unfair competition with respect thereto. We agree that the plaintiffs have failed to define a plausible market and conclude that the plaintiffs cannot establish that the defendants have substantial market power in the market for restraint services properly defined. Accordingly, we affirm the district court's dismissal of plaintiffs' antitrust claims and vacate the district court's dismissal of the copyright claim against the state defendants.

BACKGROUND

For purposes of reviewing a motion to dismiss, we assume the accuracy of the plaintiffs' allegations in their complaint. *Patane v. Clark*, 508 F.3d 106, 111 (2d Cir. 2007) (per curiam). "[O]ur review is limited to undisputed documents, such as a written contract attached to, or incorporated by reference in, the complaint." *Official Comm. Of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, L.L.P.*, 322 F.3d 147, 160 n.7 (2d Cir. 2003) (citing *Cortec Indus., Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47 (2d Cir. 1991)).

OCFS (previously DFY and DSS) operates juvenile facilities and monitors child care providers in the state of New York. The New York legislature mandated that OCFS:

> promulgate regulations concerning standards for the protection of children in residential facilities and programs operated or certified by the division, from abuse and maltreatment . . . Such standards shall . . . establish as a priority that: . . . administrators, employees, volunteers and consultants receive training in . . . : the characteristics of children in care and techniques of group and child management including crisis intervention.

N. Y. Exec. Law § 501(12); *see also* N.Y. Soc. Serv. Law § 462(1)(c). To that end, state regulations require that each supervised child care facility "submit[ ] its restraint policy to [OCFS]" and prohibit the use of "any method of restraint unless it has . . . been approved in writing by [OCFS]." 18 N.Y. Comp. Codes R. & Regs. § 441.17(c).

In 1987, New York State purchased HWC's method for use in its own facilities. That year, DFY contracted with HWC to provide training in HWC's methods to its staff (the "1987 contract"). The 1987 contract provided that HWC would train 120 DFY staff members over fifteen days in HWC's methods. It further provided that HWC would furnish DFY with one "copy of Handle With Care (copyrighted) which [DFY] may reproduce in whole or in part as required by [DFY]" and "a videomaster of the restraint program to be used by [DFY's] master trainers in conducting training programs for facility staff." Finally, the contract stated that "[t]his agreement shall commence January 1, 1988 and end March 31, 1988." There is no dispute that HWC fulfilled its obligations under the 1987 contract and trained 120 DFY staff, some of whom were master trainers, during the relevant three-month term. In 1997, however, after two incidents at DFY facilities in which children were harmed by the use of improper restraint techniques, DFY requested that HWC provide retraining to its staff.

The resulting contract (the "1997 contract") provided that HWC would "update and recertify existing [DFY] Crisis Management/Physical Restraint trainers in the techniques encompassed in the *Handle With Care* program;" that it would "deliver twelve (12)

days of training to approximately one hundred twenty (120) existing [DFY] trainers;" and that DFY had "the right to reproduce all training materials."[1] The contract provided that the "agreement shall commence May 1, 1997 and end August 31, 1997." Additionally, HWC required DFY staff members to sign individual contracts acknowledging that their certification to train in HWC's methods terminated after one year.

HWC furnished the training and materials in conformity with the 1997 contract. Thereafter, there is no dispute that DFY master trainers, using HWC's materials, trained the rest of DFY's staff in the HWC method. A year later, DFY merged into OCFS and the latter continued to use HWC's materials to train its staff.

HWC faced competition in the restraint method and training business. Cornell, in partnership with the State of New York, developed and marketed its own restraint method and training services called Therapeutic Crisis Intervention ("TCI"). HWC and TCI competed in providing restraint training services to various agencies, organizations, and businesses.

Sometime after DFY merged with OCFS in 1998, OCFS began to withhold its approval of each facility's restraint method unless the TCI method was used. After learning of the alleged policy change at OCFS, HWC filed the instant action challenging the policy, claiming that OCFS, Cornell, and HCC conspired to monopolize the market for restraint services in violation of the antitrust laws. HWC also claimed that OCFS infringed HWC's copyright by reproducing HWC's materials in 1998 and by continuing to use them and made various state law claims. After the district court dismissed these claims, HWC appealed.

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[1] We note that, as defendants acknowledge on appeal, the district court was mistaken in its view that the contract was "drafted by Chapman."

DISCUSSION

I. Legal Standard

We review *de novo* the dismissal of a complaint for failure to state a claim, and accept all well-pleaded facts as true and consider those facts in the light most favorable to the plaintiff. *Patane v. Clark*, 508 F.3d 106, 111 (2d Cir. 2007) (per curiam).

> To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.' Once a claim has been adequately stated, it may be supported by showing any set of facts consistent with the allegations in the complaint.

ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Bel' Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)).

II. The Copyright Claim

HWC's copyright claim against the state defendants is dependent upon the terms of the 1997 contract. There is no dispute that DFY copied HWC's materials; the only question is whether DFY had the right to do so. *See Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998) ("A copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement."). "In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions." *Am. Express Bank Ltd. v. Uniroyal, Inc.*, 562 N.Y.S.2d 613, 614 (N.Y. App. Div. 1990) (citations omitted). The question of whether a provision in an agreement is ambiguous is a question of law. *Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir. 2002). Under New York law, the presence or absence of ambiguity is determined by looking within the four corners of the document, without reference to extrinsic evidence. *Kass v. Kass*, 696 N.E.2d 174, 180

(N.Y. 1998). "[A]n ambiguity exists where a contract term could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 184 (2d Cir. 2003) (internal quotation marks and citation omitted).

We must decide whether the 1997 contract is ambiguous as to the duration of the license granted to copy HWC's materials. Although both parties contend that the 1997 agreement is unambiguous on its face, they draw different conclusions as to the duration of the license. HWC claims that, according to the 1997 contract's "Term of Agreement" provision, DFY's right to copy its materials ended on August 31, 1997 (120 days after the agreement commenced). The state defendants, however, contend that the 1997 contract unambiguously grants DFY a perpetual right to copy HWC's materials. The district court agreed with the state defendants. We disagree and conclude that the contract on its face is ambiguous.

The purpose of the 1997 contract is not disputed: HWC agreed to "update and recertify existing [DFY] Crisis Management/Physical Restraint trainers in the techniques encompassed in the *Handle With Care* program." To that end, the agreement provided that HWC would perform twelve days of training to DFY trainers. The DFY trainers would then train the rest of DFY's staff in HWC's methods. Contemplating that the DFY trainers would need to utilize HWC's materials in training the rest of the Division staff, the 1997 contract acknowledged that "[DFY] has the right to reproduce all training materials."

HWC's argument that the license to copy its materials expired after 120 days conflicts with the agreement's purpose. While the 1997 contract states that the "agreement shall commence May 1, 1997 and end August 31, 1997," there is nothing in the contract that expressly indicates that this provision governs the duration of

the license to copy HWC's materials. Indeed, from the four corners of the agreement, it is not at all certain that the parties intended that DFY's rights to copy HWC's materials terminate so quickly. HWC plainly knew that it was training trainers who, if they were to train the rest of DFY's staff, would need to copy HWC's materials. The provision allowing use of HWC's materials is unclear on its face as to whether it was meant to end with the agreement, or whether it was meant to continue for a reasonable period of time after the agreement ended to allow for further training of DFY staff.

We are equally unpersuaded that the 1997 contract granted a perpetual license. There is no indication from the contract that the license to copy HWC's materials was meant to be perpetual. And under New York law, "[c]ontracts which are vague as to their duration generally will not be construed to provide for perpetual performance." *Ketcham v. Hall Syndicate, Inc.*, 236 N.Y.S.2d 206, 214 (N.Y. Sup. Ct. 1962). In the absence of a clear provision, courts are reluctant to declare a perpetual license as a matter of law. *See Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655, 661 (S.D.N.Y. 1959), *aff'd*, 280 F.2d 197 (2d Cir. 1960) (per curiam). Because the contract here does not explicitly grant a perpetual license, we do not find that it did so.

After rejecting both parties' arguments and finding no plausible alternative within the four corners of the document, we conclude that the 1997 contract is ambiguous as to the duration of the license. This leaves us two choices. "We may resolve [the] ambiguity . . . if there is no extrinsic evidence to support one party's interpretation of the ambiguous language or if the extrinsic evidence is so one-sided that no reasonable factfinder could decide contrary to one party's interpretation. Or, we may remand for the trial court to consider and weigh extrinsic evidence to determine what the parties intended." *Collins*, 303 F.3d at 433 (internal quotation marks and citation omitted). We choose the latter.

The extrinsic evidence presently in the record does not answer the question. HWC points out that when it provided retraining in 1997, it required each Division trainer to sign a contract acknowl-

edging that his/her certification expired after one year. This evidence would support a finding that the license granted under the 1997 contract was of a more limited duration. The evidentiary record, however, is incomplete. Because further fact-finding is necessary, we remand the copyright claim to the district court for further proceedings consistent with this opinion.[2]

III. Plaintiffs Have Failed to Define the Proper Market for Antitrust Purposes

HWC claims that OCFS, in cooperation with Cornell, has conspired to create a monopoly in the market for "training services to private child care providers located within the State of New York" by withholding approval of supervised facilities that do not use the TCI method. HWC alleges that HCC was complicit in this arrangement because, after HWC trained HCC's staff in 2001, HWC discovered that one of HCC's training coordinators "appeared in TCI's training manual and video illustrating" HWC's proprietary methods.

For a monopoly claim "[t]o survive a Rule 12(b)(6) motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes -- analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible." *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001) (internal quotation marks and citation omitted). "[T]he reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it" determine "[t]he outer boundaries of a product market." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Though "market definition is a deeply fact-intensive inquiry [and] courts [therefore] hesitate to grant motions to dismiss

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[2] Because the district court did not have occasion to reach the state defendants' Eleventh Amendment immunity defenses, and because the Eleventh Amendment would not, in any event, bar suit against OCFS officials and employees sued in their official capacity for injunctive relief, *Henrietta D. v. Bloomberg*, 331 F.3d 261, 287 (2d Cir. 2003), we do not need to reach this issue.

for failure to plead a relevant product market," *Todd*, 275 F.3d at 199-200, "[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted," *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997). Here we find that plaintiffs' proposed relevant market does not encompass all interchangeable substitute products. We therefore affirm the district court's dismissal of the antitrust claims.

HWC contends that the relevant market for our analysis here is the market for "restraint training services to private child care providers located within the State of New York." This definition is too narrow. HWC has failed to show how the market for restraint training services *to child care providers* is any different from the larger market for restraint training services to other businesses, agencies, and organizations. "Interchangeability implies that one product is roughly equivalent to another for the use to which it is put. . . ." *Queen City*, 124 F.3d at 437 (internal quotation marks and citation omitted). Plaintiffs do not contest that Handle With Care is marketed to and utilized by various organizations, institutions, and agencies that are not child care providers. Indeed, plaintiffs readily admit in their complaint that they compete for such contracts on a "national and international" basis. The unifying characteristic of this market is that each purchaser needs to restrain individuals, not just children.

Because "the reasonable interchangeability of use . . . between the product itself and substitutes for it" determines "[t]he outer boundaries of a product market," it is apparent that the proper market here is the larger market for restraint training services to businesses, agencies, and organizations with the need to safely restrain individuals of all ages, not the more limited market for child restraint services. *Brown Shoe*, 370 U.S. at 325. As the district

court noted, the larger market includes social service agencies, law enforcement agencies, correctional facilities, educational facilities, and even airlines.

Furthermore, we reject HWC's argument that because private child care providers in New York must have OCFS approval in order to operate, and thus that the market is specialized, it stated a plausible discrete relevant market. The relevant inquiry is not whether a private child care provider may reasonably use both approved and non-approved OCFS methods interchangeably, but whether private child care providers in general might use such products interchangeably. *See Queen City*, 124 F.3d at 438. HWC's proposed relevant market "clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff 's favor." *Id.* at 436. We thus agree with the district court that the "Plaintiffs have not offered any theoretically reasonable explanation for restricting the product market to child care providers that require OCFS approval, or provided a sufficient factual predicate to support an inference that OCFS enjoys any substantial market power in the broader market for restraint services." Plaintiffs' proposed market is therefore legally insufficient and dismissal of the antitrust claims was appropriate.[3]

CONCLUSION

For the foregoing reasons, the judgment below is AFFIRMED as to the antitrust claims and VACATED as to the copyright claim and the case is REMANDED to the district court for further proceedings consistent with this opinion.

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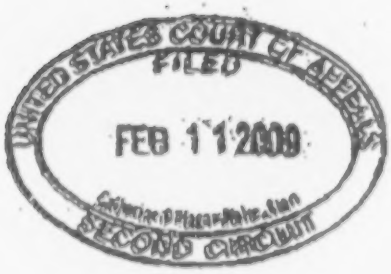
[3] HWC argues that the district court exceeded its allowable discretion in dismissing their antitrust claims with prejudice, as opposed to allowing HWC to amend their complaint. Given the nature of the claims, repleading would be futile; HWC offers no plausible argument as to how the failure to plead a relevant market could be rectified through an amended complaint. *See Patane v. Clark*, 508 F.3d 106, 113 n.6 (2d Cir. 2007) (per curiam).

APPENDIX C



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket Number: 05-7010-cv

ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of February, two thousand and nine,

Bruce Chapman and Handle with Care Behavior Management System, Inc,

Plaintiffs-Appellants,

v.

New York State Division for Youth; New York State Office of Children & Family Service, New York State Department of Social Services, John Johnson, Commissioner of New York State Office of Children and Family Services and former Commissioner of the New York State Division for Youth, in his official and individualy capacity, Margaret Davis, former Director of

Training for the New York State Division for Youth, and former Director of training for New York State Office of Children and Family Services, in her official and individual capacity., Patsy Murray, former associate Training Technician for the New York State Division for Youth, and current position as Trainer for New York State Office of Children and Family Services, in her official and individual capacity., Cornell University, Jeffrey Lehman, President of Cornell University, in his official and individual capacity, Doctor Hunter Rawlings, III, former President of Cornell University, in his official and individual capacity, New York State College of Human Ecology, Family Life Development Center, Residential Child Care Project, Therapeutic Crisis Intervention, Martha Holden, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in her official and individual capacity, Michael Nunno, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in his official and individual capacity: Hillside Children's Center, Dennis Richardson, President and CEO of Hillside Children Center, in his official and individual capacity, Douglas Bidleman Employee of Hillside Children's Center and Therapeutic Crisis Intervention Trainer, in his official and individual capacity,

Defendants-Cross-Defendants-Appellees.

Appellant Handle With Care Behavior Management Systems, Inc. having filed a petition for panel rehearing, or, in the alternative, for rehearing en bane, and the panel that determined the appeal having considered the request for panel rehearing, and thc active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O' Hagan Wolfe, Clerk

By: /s/
Frank Perez, Deputy Clerk